IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 10TH SEPTEMBER 2007 / 19TH BHADRA 1929

Crl.Rev.Pet.No. 2194 of 2004(D)

CRA.122/2002 of ADDL. SESSIONS COURT (ADHOC)-II, ALAPPUZHA
CC.340/1999 of JDUL.MAGISTRATE OF FIRST CLASS, RAMANKARI

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REVN. PETITIONER:

RANI GEORGE, W/O.GEORGE,
PALLADANS, CMC 23, CHERTHALAI.

BY ADV. SRI.M.T.SURESHKUMAR
SRI.M.T.SURESHKUMAR

RESPONDENTS:

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1. THRESIAKKUTTY CHERIAN,
MALIYAMPURACKAL VEEDU,
PULINCUNNU.

2. STATE OF KERALA, REPRESENTED
BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR
SRI.V.RAJENDRAN (PERUMBAVOOR)

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 10/09/2007, ALONG WITH CRRP NO. 2330 OF 2004 CRRP NO. 2352 OF 2004 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl.R.P.Nos. 2194/04,2352/04 and 2330/04

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Dated: 10th day of September 2007

ORDER

The revision petitioner in Crl.R.P. 2194 of 2004 are accused Nos. 5 and 7, the revision petitioner is Crl.r.P. No. 2330 of 2004 are accused Nos. 5 and 6 and the revision petitioner in 2352 of 2004 is the 3rd accused in C.C.340 of 1999 on the file of the J.F.C.M. Ramankary. A partnership firm by name "Matha Modern Mills" and seven of its partners were prosecuted in the said case by the first respondent herein by filing a private complaint alleging the commission of an offence punishable under Sec. 138 of the negotiable Instruments Act, 1881 (N.I. Act for short) .

2. The case of the prosecution as averred in the private complaint can be summarised as follows:

The second accused is the Managing partner and accused Nos. 3 to 8 are active partners entitled to share the profits of the first accused partnership firm. The 2nd accused is conducting the business on behalf of the first accused firm. The 2nd accused is the Managing Partner entitled to enter into financial dealings on behalf of the other partners. Accused Nos. 2 to 8 are responsible for the debts and liabilities of the said firm. The 2nd accused acting on behalf of the firm

borrowed a sum of Rs. 4,25,000/- from the complainant and in discharge of the said liability he executed the original of Ext.P2 cheque for the said amount. The cheque when presented before the drawee bank was dishonoured for want of sufficient fund in the account of the accused. Thereafter, the original of Ext.P4 statutory notice was issued to the accused. Even after due receipt of the statutory notice the accused have not paid the amount covered by the cheque within the statutory period. Hence, the complaint.

3. Since A1, A2, and A8 were absconding, the case against them were split up and re-filed and A3 to A7 alone stood trial.

4. On the side of the complainant two witnesses were examined as P.Ws 1 and 2 and 10 documents were marked as Exts.P1 to P10.

5. When examined under Sec. 313 (1) (b) Cr.P.C. A2 to A3 denied the incriminating circumstances put to them and maintained their innocence. On the side of the defence two witnesses were examined as DWs 1 and 2 and three documents were marked as Exts. D1 to D3.

6. The learned Magistrate, after trial, as per judgment dated 18-4-2002 found A3 to A7 guilty of the offence and sentenced each of them to simple imprisonment for a period of one year and to pay a

fine of Rs. 5,000/- and on default to pay the fine to undergo simple imprisonment for three months.

7. On appeal preferred by the revision petitioners before the Sessions Court, Alappuzha, as Crl.A. Nos. 118, 122 and 126 of 2002 the learned Addl. Sessions Judge , Fast Track – II,Alappuzha dismissed the appeals confirming the conviction entered and the sentence passed against them. Hence, theses Revisions.

8. On the side of the revision petitioners the following two points were stressed in support of the revisions:-

i) Complaint was bereft of the necessary averment under Sec. 141 of the Negotiable Instruments Act. In other words, there was no averment in the complaint that accused Nos. 3 to 7 were in-charge of and responsible to the first accused firm for the conduct of the business of the firm and hence the prosecution was bad in law.

ii) On 19-5-2004 on behalf of accused Nos. 1,2 and 8 a petition for compounding the offfence was filed before the Magistrate and as per order dated 19-5-2003 the offence was compounded and the said accused were acquitted under Sec. 320 (8) Cr.P.c. as evidenced by Annexure – II order. When the offence was compounded not only as against A2 and A8 but also as against the first accused firm, the continued prosecution of A3 to A7 for the very same offence is bad in law.

9. Opposing the aforesaid two grounds, the learned counsel appearing for the first respondent complainant made the following submissions:-

The averment in the complaint that accused Nos. 3 to 8 are active partners entitled to share the profits is wide enough to bring

the case under Section 141 of the Negotiable Instruments Act. The exact averment in the complaint reads as follows:-

> "മൂന്ന് മുതൽ എട്ട് വരെ പ്രതികൾ ടി സ്ഥാപനത്തിലെ ലാഭവിഹിതംലഭിക്കാൻ അർഹതയുള്ള സജീവ പങ്കാളികളാണ്."

The aforesaid averment makes it beyond doubt that A3 to A7 are also active partners who are entitled share the income of the firm. A verbatim reproduction of the wording of Section 141 of the N.I. Act is not called for. Moreover, P.W.1 the complainant examined as P.W.1 has in unmistakable terms deposed before court that accused Nos. 2 to 8 are conducting the day-today affairs of the firm and are sharing the share profits and are also bound to discharge the debts of the firm. The complaint cannot be read in isolation but has to be read along with the testimony of the complainant./ Hence the complaint does not suffer from any of the deficiencies alleged against it. With regard to the alleged composition covered by Annexure 2 order a reading of sub Section 8 of Sec. 320 Cr.P.C. will clearly shows that the composition will have the effect of an acquittal only those accused with whom the offence has been compounded. Even assuming that the offence has been compounded as against the firm, that by itself will not absolve the other partners of their liability and they will continue to be liable for the offernce notwithstanding the

composition of the offence.

10. After hearing both sides and after perusing the records, I am not inclined accept the submission made on behalf of the first respondent/complainant that the prosecution of accused Nos. 3 to 7 by recourse to Sec. 141 of the N.I. Act is well founded. Apart from the averment in the complaint which has been extracted above the complaint further pleads as under:-

> "രണ്ടാം പ്രതി മറ്റ് പ്രതികൾക്ക് വേണ്ടി സാംപത്തിക ഇടപാടുകൾ നടത്താൻ അധികാരപ്പെട്ട Managing Partner ആണ്"

The opening paragraph of the complaint itself avers that the 2nd accused is the Managing partner of the firm. So, if the second accused in his capacity as Managing Partner is admittedly authorised to enter into financial transactions on behalf of the other accused as pleaded in the complaint, it is futile for the complainant to contend that accused Nos. 3 to 8 were in-charge of and were responsible to the firm for the conduct of the business of the firm so as to be made liable. The legal position is no more res integra. The matter has been authoritatively pronounced upon in the decisions reported in **Binod Kumar Gupta and Others v. Ram Ashray Mahoto and Others -2005 (4) SCC 209, S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr. - JT 2007 (4) SC 230, Sabitha Ramamurthy & Anr. v. R.B.S. Channabasavaradhya - AIR 2006**

SC 3086 and Raghu Lakshminarayanan v. M/s. fine Tubes - JT 2007 (5) SC 552. Unless the complaint contains an averment to the effect that the person made as an accused was in-charge of and was responsible to the firm in the conduct of the business of the firm such person cannot be proceeded again. There is no averment in the complaint under Sub Sec. (2) of Section 141 as well so as to proceed against any of the partners other than the managing partner. In the cases cited even an averment that the accused was actively involved in the management of the company was found insufficient to launch a prosecution against such accused.

11. Equally misconceived is the argument that the deposition of the complainant has to be read along with the complaint. if the said submission is accepted, omission of vital averment in the complaint could be supplied by the ipsi dixit of the complainant while he is in the witness box. That does not appear to be the requirement of law. The averments in the complaint will have to be scrutinised in isolation to see whether the complaint contains the necessary averments as mandated by sub section (1) of Sec. 141 of the N.I. Act so as to justify the prosecution of persons other than the managing partner or managing director of a firm or a company. The prosecution of accused numbers 3 to 7 (revision petitioners) is therefore misconceived and the conviction entered and the sentence

passed against the revision petitioners cannot therefore be sustained and are accordingly dislodged.

12. In the light of the conclusion reached with regard to the first ground put forward by the revision petitioners, I do not think it necessary to consider the second contention that the composition of the offence as against the firm will exonerate all the partners of the firm.

13. In the result, these revisions are allowed and the conviction entered and the sentence passed against the revision petitioners for the offence punishable under Section 138 of the N.I. Act are set aside. Revision petitioners are acquitted of the said offence and are set at liberty. The amount , if any, deposited towards fine shall be refunded to the depositors.

V. RAMKUMAR,
(JUDGE)

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